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Supreme Court, U.S.
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In The

Supreme Court of the United States

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association, HARRY C. TALBOTT, GALEN R. WALLACE, and ALLEN M. (MAC) WILLIAMS,

Petitioners,

v.

MONIKA TODD, in her official capacity as County Clerk of Mesa County, Colorado and BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State violates the Equal Protection clause by granting the right of initiative to residents of certain counties, as well as residents of cities and towns, while withholding that right from residents of certain other counties.

2. Where the citizens of a State have reserved the right of initiative as to legislative matters, whether the legislature of that State violates the Equal Protection Clause by delegating authority over certain of those legislative matters to county governments, some of which counties are prohibited from allowing ballot initiatives, thereby depriving the residents of those counties of the right of initiative, while that right is freely exercised by residents of other counties.

LIST OF PARTIES

There are no parties in this case other than those disclosed in the caption. None of the parties is a private corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 279 F.3d 1204, and is referred to herein as the "Appellate Opinion." The Appellate Opinion appears at 1a through 18a of this petition. The opinion of the United States District Court for the District of Colorado was handed down in open court. A copy of the transcript of the hearing at which the court's decision was rendered appears at 21a through 39a of this petition; the Order and Judgment based thereon appears at 19a to 20a. In *Dellinger v. Board of County Commissioners for the County of Teller*, 20 P.3d 1234, 1237 (Colo. App. 2000), *cert. denied*, No. 00SC801 (Colo., April 9, 2001), the Colorado Court of Appeals held that the right of initiative may not be exercised by residents of Colorado's "statutory" counties. This opinion appears at 44a through 52a.

JURISDICTION

The judgment and the Tenth Circuit's opinion were handed down February 7, 2002. Petitioners did not seek rehearing. No extension of time has been sought to file this petition. Jurisdiction in this Court is proper under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides, in part: "No state shall . . . deny to

any person within its jurisdiction the equal protection of the laws."

SUMMARY OF PETITION

This case raises important issues about how citizens exercise their right to initiate and enact legislation. Petitioners here were denied the right to initiate a ballot measure concerning land use issues in Mesa County, Colorado, because Mesa County is a "statutory" county, i.e., neither a home rule county nor a combined city and county. In Colorado, citizens of home rule counties and combined cities and counties may initiate ballot measures, but citizens of statutory counties may not. Likewise, citizens of cities and towns may initiate ballot measures, while citizens of unincorporated parts of statutory counties may not. Petitioners submit to this Court that the Colorado legislature violated the Equal Protection Clause by denying the right of franchise through the initiative to residents of statutory counties, while simultaneously granting such rights to residents of home rule counties, combined cities and counties, as well as cities and towns.

In its ruling below, the Court of Appeals held that the Colorado legislature's removal of the right of initiative from citizens of statutory counties, but not home rule counties, did not affect a fundamental federal right, holding that "initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution." Appellate Opinion at 10a. However, numerous decisions by this

Court have determined that the right to vote is a fundamental right, even if that right is not found in the federal constitution but rather created by state action.

Further, the Court of Appeals erroneously concluded that the initiative process implicates the federal constitution "only by the state's attempts to regulate speech associated with an initiative procedure. . . . " Appellate Opinion at 11a. This Court has on numerous occasions applied an equal protection analysis to both the grant of the franchise as well as its implementation. Further, this court has held that the form of a democracy is a political question not subject to judicial review, and thus the appellate courts may not afford lesser protections to direct democracy, as compared to representative democracy. Finally, the Court of Appeals incorrectly applied a rational basis of review, without analyzing the burdens placed on Petitioners' ability to initiate legislation. This Court has ruled that any restriction on the franchise to vote merits a stricter scrutiny of review.

This Court has an opportunity to consider whether citizens engaging in direct democracy, such as initiatives and referenda, must receive the same type of constitutional protection as citizens engaging in activities affecting representative democracy. Although this Court has explicitly addressed freedom of expression protections within the context of the initiative, further guidance is needed regarding the applicable equal protection standards.

Clear equal protection standards in the initiative and referendum context have important practical significance. All 50 states allow the right of initiative or referendum on

the local level, and 27 states, as well as the District of Columbia, allow the right of initiative or referendum for statewide issues. Indeed, every single state has implemented direct democracy in one form or another. Just as importantly, direct democracy plays an important role in American governance. The right of initiative in particular serves as an important check on representative democracy, a tool that citizens may utilize to overcome an unresponsive or gridlocked government. Such an important and widespread form of governance requires clear constitutional standards.

STATEMENT OF THE CASE

This case arises out of land use disputes in the Palisade/East Orchard Mesa section of Mesa County, Colorado, an area nationally famous for the quality of its fruit.[1] The mild weather and scenic beauty of this area have also attracted extraordinary residential growth in the last decade. As a consequence, substantial amounts of prime agricultural land have been converted to residential subdivisions. Ongoing residential and commercial development of agricultural land has led to sharp land-use conflicts between fruit growers on one side, and developers and homeowners on the other. Save Palisade FruitLands and the individual plaintiffs ("Petitioners")

[1] The facts are taken from the allegations in the Complaint, below. They must be deemed as true given that the lower court action for which review is sought in this Court was a dismissal of the Complaint by the district court and affirmance of that dismissal by the Tenth Circuit.

represent fruit growers and wine producers involved in the political struggles over land use in Mesa County.

As part of their political efforts, Petitioners sought to place a measure on the Mesa County general election ballot to restrict subdivisions on prime agricultural land. Upon receiving the proposed measure, however, Mesa County Clerk Monika Todd ("Respondent") refused to allow the ballot measure to go forward.[2] She reasoned that the Colorado Constitution and Colorado Statutes do not allow the citizens of Mesa County the right to initiate a ballot measure because Mesa County is a statutory county. Under her reasoning, citizens of home rule counties, combined cities and counties, cities and towns may initiate ballot measures but citizens of statutory counties may not. There is no dispute that Petitioners would have had access to the ballot had they been residents of a home rule county or a combined city and county, or if they had sought to amend the land use legislation of a city or town.

Following the County Clerk's refusal, Petitioners initiated the current litigation claiming violations of First and Fourteenth Amendments to the Constitution of the United States, and of the Civil Rights Act, 42 U.S.C. § 1983. Petitioners sought jurisdiction under 28 U.S.C. §§ 1331 and 1343.

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[2] Specifically, Ms. Todd refused to prepare a ballot title. After the proposed measure is filed, the county clerk must prepare a summary of the measure, which the proponents will print on each petition. *See* COLO. REV. STAT. § 30-11-103.5 (counties are to use and adapt the municipal government initiative procedures under part 1 of Article 11, Title 31, COLO. REV. STAT. [codified as COLO. REV. STAT. § 31-11-101 through -118].

Broadly speaking, Colorado presently has three levels of government that enact legislation: the General Assembly, county governments, and municipalities. In 1910, the people of the State of Colorado reserved the right of initiative at the state level in the Colorado Constitution, Art. V, § 1,[3] (the "1910 Amendment") They "further reserved" this right

> to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in and for their respective municipalities.

COLO. CONST. Art. V, § 1(9).[4]

In reserving the right of initiative to themselves, the people did not empower the general assembly to strip that right from them by the delegation of legislative powers to statutory counties. Indeed, the reservation of the right of initiative was specifically made "independent of the general assembly," COLO. CONST. Art. V, § 1(1). Apart from the form of the petition, which the General Assembly may prescribe, the Constitutional reservation of the right of initiative was also made "in all respects self-executing," COLO. CONST. Art. V, § 1(10). These provisions were included to prevent the legislature from weakening the right of initiative.

The text of the 1910 Amendment made no explicit reference to electors that reside in unincorporated parts

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[3] The right of initiative in Colorado is a reserved power, and not a matter of "legislative grace." *See McKee v. City of Louisville*, 200 Colo. 525, 616 P.2d 969, 975 (1980).

[4] The full text of COLO. CONST. Art V, § 1 is set out at 40a-45a.

of a county. The adoption of the 1910 Amendment did represent, however, a complete reservation of the right of initiative with respect to legislative power at the local level because, in 1910, Colorado counties did not exercise any legislative powers. In 1910, counties were mere instrumentalities of the General Assembly, and county commissioners simply implemented directives issued by the Colorado General Assembly.

Shortly before this statewide reservation of power, in 1901, the people had given home rule, coupled with the right of initiative, to the citizens of Denver. COLO. CONST. Art. XX, §§ 1-5.[5] In 2001, by virtue of a 1998 amendment to the Colorado Constitution, the City of Broomfield became a combined city and county. Its city charter, which guaranteed the right of initiative, became the initial Charter of the City and County of Broomfield. COLO. CONST. Art. XX, § 10. Thus, all residents of combined cities and counties in Colorado have the right of initiative.

In 1969, the people of Colorado amended their Constitution to authorize the creation of home rule counties.

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[5] The City and County of Denver was created as a result of the adoption of Article XX to the Colorado Constitution in 1901. Article XX, § 5, provided that "[t]he citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided . . . . " This provision created the right of initiative as to local matters in the citizens of the City and County of Denver. *Speer v. People*, 122 P. 768, 769 (Colo. 1912); *Mauff v. People*, 123 P. 101, 103-104 (Colo. 1912).

COLO CONST. Art. XIV, § 16. In implementing this provision, the Colorado General Assembly required that county home rule charters explicitly provide for the right of initiative and referendum. 1971 COLO. SESS. LAWS at 353, § 1, now codified at COLO. REV. STAT. § 30-11-508. Two Colorado counties, Weld County and Pitkin County, are now home rule counties.[6] Thus, all residents of home rule counties have the right of initiative.

Home rule counties in Colorado must exercise all of the powers mandated to statutory counties by law, and may elect to exercise those powers that statutory counties are permitted, but not required, to exercise. COLO. REV. STAT. § 30-25-103. The powers of home rule counties with respect to planning and zoning, which are the county functions germane to this petition, are identical to those of statutory counties. *See* COLO. REV. STAT. § 30-25-201(40).

The Colorado General Assembly has extended the right of initiative to citizens of statutory counties with respect to certain narrow topics, such as the imposition of

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[6] Those seeking home rule for a county must submit a petition containing signatures of at least five percent of the registered electors of the county. Upon receipt of a petition, the Board of County Commissioners must call an election to elect a charter commission. The Charter commission is obligated to conduct a comprehensive study of the operation and management of county government, and to present a proposed county charter, which is presented to public hearings, and then submitted to the electors for approval. This is a cumbersome and time-consuming process. *See* COLO. REV. STAT. § 20-11-502-503. At present, 60 of 64 counties are not home rule, and the citizens of those counties have thus been denied the ability to initiate laws at the county level.

sales taxes. COLO. REV. STAT. § 29-2-104(1). However, citizens of statutory counties are prohibited from adopting ballot measures concerning general legislative issues, including land use and zoning.[7]

Whereas in 1910 counties were merely instrumentalities of the General Assembly, today all Colorado counties – whether they be "statutory," home rule, or combined cities and counties – have become independent legislative bodies. As late as 1949, the Colorado Supreme Court flatly stated that "a board of county commissioners is not a legislative body possessing powers to declare a public policy to be enforced within county lines." *Board of County Commissioners of Gunnison County v. Buckley*, 213 P.2d 608, 611 (Colo. 1949). Governmental control over county governments as to all issues – including land use – resided solely in the General Assembly, a legislative body answerable to popular vote and constrained by the initiative process. As required by Colorado's constitution in 1910, the power of the General Assembly was subject

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[7] In *Dellinger v. Board of County Commissioners for the County of Teller*, 20 P.3d 1234, 1237 (Colo. App. 2000), *cert. denied*, No. 00SC801 (Colo., April 9, 2001), the Colorado Court of Appeals squarely held, in a case of first impression, that the right of initiative was not applicable to and exercisable by the electors of unincorporated, non-home-rule counties in Colorado. Indeed, the court held that Colorado's laws and constitution prohibit citizens of statutory counties from exercising the right to initiative. With the denial of *certiorari* by the Colorado Supreme Court, *Dellinger* has settled this question of Colorado Law, thus making it ripe for federal review. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-80, 117 S.Ct. 1055, 1072-1075, 137 L.Ed.2d 170 (1997). The opinion in *Dellinger* is set out at 46a-54a.

to the check of the citizens' power of initiative and referendum.

After the Constitutional reservation of the right of initiative and referendum occurred, the Colorado legislature began transferring broad legislative powers to counties, thus fundamentally altering the legislative powers enjoyed by statutory counties. For example, in 1939, statutory counties received the right to advise and enact zoning ordinances.[8] More importantly, in 1974, Colorado's General Assembly adopted the Local Government Land Use Control Enabling Act, COLO. REV. STAT. §§ 29-20-101 through -108, which transferred to statutory counties the authority to enact comprehensive land use controls and inter-governmental agreements. Within Colorado, land use powers are legislative powers. *See, e.g., Kizer v. Beck*, 496 P.2d 1062 (1972) (noting that the Colorado Supreme Court has "repeatedly stated that zoning and rezoning are legislative matters"). Even prior to the transfer of land use powers to statutory counties, by 1967 the treatment of statutory counties reflected in *Board of County Commissioners of Gunnison County v. Buckley*, 213

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[8] Section 10, chapter 92, Session Laws of 1939, provides: "The county planning commission of any county * * * shall make a zoning plan or plans for zoning all of any part of the unincorporated territory within such county, * * * representing the recommendations of the commission for the regulation by districts or zones of the location, height, bulk, and size of buildings and other structures, percentage of lot which may be occupied, the size of lots, courts, and other open spaces, the density and distribution of population, the location and use of buildings and structures for trade, industry, residence, recreation, public activities or other purposes * * * ."

P.2d 608, 611 (Colo. 1949), was no longer valid. In upholding a county's regulation of truck traffic through unincorporated parts of the county, the Colorado Supreme Court stated:

> in Colorado our legislature, as government has grown more complex, has extended its reliance on Boards of County Commissioners to carry out, on a local level, local governmental functions where it has deemed such necessary . . . . counties have been delegated the following powers, among others, each of which requires the Board of County Commissioners to exercise certain police powers, viz.: to license and control dogs; to adopt building regulations and restrictions, to license and regulate public dance halls, to issue liquor licenses, to adopt zoning regulations, to regulate roadside signs on county roads, and to adopt, subject to state approval, lower prima facie speed limits on highways and roads located in unincorporated areas within their boundaries.

Asphalt Paving Co. v. Board of County Commissioners of County of Jefferson, 425 P.2d 289, 293 (Colo., 1967) (statutory citations omitted).

As a result of the delegations by the Colorado legislature, boards of county commissioners of all of Colorado's counties exercise broad legislative authority. Under *Dellinger v. Board of County Commissioners for the County of Teller*, 20 P.3d 1234, 1237 (Colo. App. 2000), *cert. denied*, No. 00SC801 (Colo., April 9, 2001), however, the residents of statutory counties may not exercise the right of initiative concerning general legislative matters, whereas residents of home rule counties may exercise that right. The

result, of course, is that the availability of this fundamental right now depends on where one lives, despite the fact that both home rule and statutory counties exercise many of the same general legislative powers.

The District Court dismissed Petitioners' complaint, finding no statutory or constitutional violation. Upon dismissal of Petitioners' claims, District Court Judge Weinshienk suggested that Petitioners could attempt a *statewide* ballot initiative. Petitioners then submitted the same measure as a statewide initiative. However, the Colorado Ballot Title Setting Board determined that it did not have jurisdiction to issue a title because the measure was neither "state legislation" nor an "amendment to the constitution" within the meaning of Colorado Constitution Art. V, § 1(2), but rather was a purely local matter. Petitioners thus have no recourse to the statewide ballot.

The Court of Appeals affirmed the district court's dismissal of Petitioners' claims. Judge Tacha, in the Appellate Opinion at 18a, suggested that Petitioners either seek to change the Colorado laws to allow citizens of statutory counties the right of initiative, or attempt to have Mesa County adopt a home rule charter. Both procedures involve substantial hurdles and burdens.[9] In

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[9] Historically, the State of Colorado has repeatedly placed burdens on the right of initiative that this Court has later found to be invalid. *See Meyer v. Grant*, 486 U.S. 414, 416 (1988) (invalidating a statute that made it a felony to pay petition circulators); *Buckley v. American Constitutional Law Foundation* 525 U.S. 182, 187 (1998) (Colorado attempted to limit the right of initiative by requiring circulation by registered voters only, requiring name badge identification of petition circulators, and requiring disclosure of circulator names and income). The right

order to gain access to the *statewide* ballot, Petitioners would have to gather signatures from 80,571 registered electors (five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election). COLO. CONST. Art. V, § 1. This number is approximately the same as the total number of registered electors in Mesa County. (By contrast, only 3,792 signatures would have been required for a county-wide initiative.) Adopting a home rule charter, as pointed out above, requires that these Petitioners shoulder the burden of reshaping the entire governmental structure of Mesa County over a protracted period of time.

Despite the fact that statutory counties such as Mesa County exercise substantial legislative powers, citizens of statutory counties – unlike citizens of home rule counties – may not initiate ballot measures. This unequal treatment arises because the Colorado General Assembly delegated legislative power to statutory counties without ensuring the citizens the continued ability to exercise the right of initiative, thus effectively stripping that right away. This action has denied citizens of statutory counties the right of initiative over legislative matters reserved by the citizenry of Colorado in 1910.

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of initiative is, in its essence, the attempt to enact legislation which the legislature will not or cannot pass. Not surprisingly, Colorado's legislature, the General Assembly, has historically not been supportive of the initiative process generally.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DEPARTED FROM WELL-ESTABLISHED PRECEDENT IN APPLYING PROPER EQUAL PROTECTION STANDARDS TO THE FUNDAMENTAL RIGHT TO VOTE IN AN INITIATIVE.

A. Once the citizens of a state reserve to themselves the right of initiative in legislative matters, the right to vote in such initiative is a fundamental right.

The appellate court held that the right of initiative is not a fundamental right, because it is found nowhere in the United States Constitution. Both the court's conclusion and its manner of reasoning depart from this Court's rulings, because once the citizens of Colorado reserve the right of initiative as to legislative matters on both the state and local level, that right becomes a fundamental right subject to the full array of Constitutional protections. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966) (the "political franchise of voting" is a "fundamental political right, because preservative of all rights.") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Consequently, the actions by the Colorado legislature in implementing and regulating that right must comply with federal constitutional requirements, because "statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626-627 (1969).

In *Harper*, this Court recognized that a fundamental right need not be explicitly stated in the Constitution. It

invalidated the Virginia poll tax, despite the absence of explicit federal language guaranteeing the right to vote in state elections. *Harper*, 383 U.S. at 665 ("while the right to vote in federal elections is conferred by Art. I, [§] 2 of the Constitution, the right to vote in state elections is nowhere expressly mentioned") (citation omitted). Likewise, in *Williams v. Rhodes*, 393 U.S. 23, 28-29 (1968) this Court applied the same reasoning to the right to vote for electors for President of the United States, holding that the right to vote for electors need not be found in the Constitution for it to receive fundamental protections. More recently, in reasoning that directly applies to the right to vote in an initiative, this Court held that "when the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

Within the First Amendment context, this Court has rejected the argument that the state can restrict the level of freedom of speech surrounding the ballot initiative, despite the fact that the initiative is solely a state-created right. *Meyer v. Grant*, 486 U.S. 414, 420 (1988) ("having decided to confer the right [of initiative], the State was obligated to do so in a manner consistent with the Constitution"). The decision in *Meyer* is consistent with other decisions holding that the right of initiative – even if wholly a state or local creation – nonetheless is subject to free expression guarantees. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981) ("contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression");

Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 191-192 (1999) (the state has considerable leeway to regulate both ballot initiatives and election processes generally, but the state interests do not justify ballot initiative procedures that inhibit voter communication).

Finally, at the inception of the initiative and referendum movement, this Court recognized that the decision to effectuate a republican form of government through direct democracy, as compared to representative democracy, is a non-justiciable issue and instead should be resolved by the political branches. *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118, 150 (1912). Thus, direct democracy and representative democracy should receive the same constitutional protections from Federal courts – this Court should be neutral with respect to the choice made by the State. Indeed, this Court has refused to dilute protections surrounding the right to vote in the context of initiatives, and in one case afforded greater protection to the right of association in the initiative context, because the possibility of corruption through corporate donations does not exist for initiatives the same way it does for elections for individual representatives. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981).

B. The right to initiative is subject to equal protection guarantees, as well as to freedom of expression guarantees.

Once the right of initiative has been reserved by the people of a state, it becomes a right subject to all constitutional protections. However, the Court of Appeals

interpreted this Court's prior holdings as implicating "only . . . the state's attempts to regulate speech associated with an initiative procedure." Appellate Opinion at 11a. However, not only do this Court's prior rulings show that the right to vote is itself a fundamental right deserving of strong constitutional protections, but also that "Equal Protection guarantees apply to both the initial allocation of the right to vote, as well as the manner of its exercise." *Bush v. Gore*, 531 U.S. at 104. Thus, the state of Colorado may not delegate legislative powers to county governments, some of which permit the right of initiative but others of which do not, without drawing equal protection scrutiny.

In many instances this Court has used an equal protection analysis to scrutinize differences in the grant of the franchise. In *Williams v. Rhodes*, 393 U.S. at 24, this Court found that Ohio's election laws violated the Equal Protection Clause by making it virtually impossible for certain political parties to gain a position on the ballot to choose electors pledged to candidates for President and Vice President. In *Evans v. Cornman*, 398 U.S. 419, 422, (1970) this Court invalidated prohibitions on voting within federal military reservations on Equal Protection grounds. While recognizing the state has "broad powers to determine the conditions under which the right of suffrage may be exercised," the court nonetheless determined that once the franchise is granted to the electorate, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 422 (quoting *Harper*). Likewise, this Court used an equal protection analysis to strike down durational requirements for voting, because such restrictions unduly

discriminated between those who had recently moved and those who had not. *Dunn v. Blumstein*, 405 U.S. 330, 334-335 (1972). Most recently, this Court applied an equal protection analysis to the selection of presidential electors in *Bush v. Gore*, 531 U.S. 98, 104 (2000).

C. The Court of Appeals incorrectly applied a rational basis review.

Because it erroneously held that the right to initiative was a discretionary state action that implicated freedom of expression guarantees only, the Court of Appeals failed to apply the proper level of scrutiny. The actions by the Colorado state legislature are subject to strict scrutiny, not a rational basis review, because the actions involve the right to vote. Regardless of the form of democracy, "statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626-627 (1969). *Accord Cipriano v. Houma*, 395 U.S. 701, 704 (1969). Therefore, the Court of Appeals should not have allowed concerns about the implications for direct democracy to enter into its analysis of the appropriate level of scrutiny. Appellate Opinion, at 13a, n. 5.

Restrictions on the right of franchise have consistently drawn strict scrutiny analysis in the equal protection context. In *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972), this Court rejected a rational basis for state legislation, requiring instead "a substantial and compelling reason for imposing durational residence requirements"

Likewise, this Court determined that before the right to vote can be restricted, "the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Evans v. Cornman*, 398 U.S. 419, 422 (1970). However, the Court of Appeals interpreted this Court's decisions in *Meyer v. Grant*, 486 U.S. 414, 416 (1988) and *Buckley v. American Constitutional Law Foundation* 525 U.S. 182, 187 (1998) – two cases arising in the context of direct democracy – as decisions that applied only to freedom of expression guarantees, rather than decisions providing guidance on the grant and implementation of the right to initiative. Consequently, the court improperly applied a rational basis approach to the Colorado legislature's treatment of the its citizens' reserved right of initiative.

II. THE COURT SHOULD DECIDE WHETHER A STATE'S GRANT OF THE INITIATIVE FRANCHISE MUST COMPLY WITH EQUAL PROTECTION REQUIREMENTS.

The present case presents the Court with an opportunity to provide direct guidance on the appropriate constitutional framework for scrutinizing regulations that implicate the right of initiative and referendum.[10] As an exercise in direct democracy, the right of initiative serves as an important check on representative democracy. Not

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[10] The initiative allows voters to propose and vote on a legislative measure or constitutional amendment. The referendum refers a proposed or existing law or statute to voters for approval or rejection. Both are forms of direct democracy. THOMAS E. CRONIN, DIRECT DEMOCRACY 2 (1999).

only does it serve to correct a misrepresentative legislature, but, more importantly, it is a vehicle citizens may utilize to overcome an unresponsive or gridlocked government. Explicit guidance concerning equal protection guarantees is needed, since this Court has primarily addressed constitutional protections concerning the franchise in cases involving representative democracy, rather than direct democracy. Two notable exceptions are *Meyer* and *Buckley*, in which this Court applied a First Amendment analysis to behavior arising within the initiative context.

Although most such cases have arisen in the context of representative democracy, this Court has never distinguished between representative democracy and direct democracy when applying the Equal Protection Clause to the grant and implementation of the voting franchise. On the contrary, this Court has refused to favor one form of democracy over another, holding instead that the validity of the initiative and referendum are properly within the control of Congress and the legislative branch. *Pacific States Telephone & Telegraph Company v. Oregon*, 223 U.S. 118, 150 (1912). Indeed, this Court has further recognized Congress' approval of direct democracy as a valid exercise of legislative power. *Ohio v. Hildebrant*, 241 U.S. 565, 568-569 (1916).

Nonetheless, Respondent successfully argued that because the initiative is a state grant of the voting franchise, only the explicit prohibitions in *Meyer* and *Buckley* apply to exercise of the initiative – despite this Court's application of an equal protection analysis to cases involving the grant and implementation of the franchise, and despite this Court's decisions placing representative

and direct democracy on an equal footing. This Court has consistently rejected similar reasoning in the past. *See, e.g., Harper*, 383 U.S. at 665; *Meyer*, 486 U.S. 420; *Williams*, 393 U.S. 28-29; *Bush*, 531 U.S. at 104. It should now explicitly reject this reasoning as it applies to direct democracy, and hold that the grant and implementation of the initiative and referendum franchise must comply with the Equal Protection Clause.

III. BECAUSE THE VAST MAJORITY OF UNITED STATES CITIZENS EXERCISE THE RIGHT OF INITIATIVE, THIS COURT SHOULD CLARIFY THE CONSTITUTIONAL PROTECTIONS AFFORDED THAT RIGHT.

The right to initiative has immense practical consequences, because it is frequently exercised both in the state of Colorado and nationwide. The right to initiative "is the safeguard of politics. It takes power from the boss and places it in the hands of the people." Woodrow Wilson, *quoted in* Burton J. Hendrick, *The Initiative and Referendum and How Oregon Got Them*, McClure's Magazine, July 1911, at 235. On a state level, Colorado's citizens have utilized this safeguard to rewrite the state constitution, determine legislative funding priorities, and limit the state's taxing authority. On a local level, Colorado citizens regularly use initiatives to determine tax priorities, land-use development patterns, and even the structure of local government itself.

Extensive use of direct democracy is not confined to the state of Colorado. All 50 states allow use of the initiative or referendum in some form on a local level.

Twenty-seven states and the District of Columbia allow use of either the initiative or referendum for statewide issues, while 24 states and the District of Columbia allow use of the initiative only. *See* Initiative & Referendum Institute, "I&R Factsheet: Popular Votes on Adopting Initiative and Referendum," *available at* http://www.iandrinstitute.org/. The implementation of this right varies according to jurisdiction, but clearly such an important exercise of the direct democracy franchise should be subject to equal protection guarantees.

Looking at the actual proportion of Americans who presently exercise the right to initiative, best estimates show that between 61 and 71 percent of all United States citizens have the right of initiative in their municipalities, and almost 75 percent of all citizens have either state or local initiatives available. Finally, 15 out of 20 of the largest U.S. cities provide for the citizen initiative. JOHN G. MATSUSAKA, THE INITIATIVE AND REFERENDUM ALMANAC: A COMPREHENSIVE REFERENCE GUIDE TO CITIZEN LAWMAKING AROUND THE WORLD (2002) (unpublished manuscript on file with the Initiative and Referendum Institute). In short, the right of citizens to exercise direct democracy is the rule, not the exception.

Like Colorado's state constitution, many state constitutions contain broad reservations of the right of initiative to residents. *See, e.g.*, MICH. CONST. Art. II, § 9 ("The people reserve to themselves the power to propose laws and to enact and reject laws"); NEB. CONST. Art. III, § 2 ("the first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature"); OR. CONST ART. IV, § 1(2)(a) ("the people reserve

to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly"). Accordingly, many states allocate the initiative franchise to their residents.

Finally, the grant of the right of initiative, not just the implementation, remains a vibrant issue today. In the past decade, Mississippi voted to implement the initiative on a statewide basis, MISS. CODE ANN. §§ 23-17-1 through 23-17-61, and Rhode Island voters passed an advisory referendum recommending adoption of the right to initiative. *See* "Referenda Totals – Question 8 – Voter Initiative," *available at* http://www.elections.state.ri.us/1996/1996MAIN.htm. As recently as March of 2002, the Governor of the State of New York announced his proposal to amend the New York State Constitution to allow both the statewide and local right of initiative, and a measure to that effect passed the state senate. *See* S. 07306, passed by New York Senate March 29, 2002. Thus, the method of implementing the initiative process, on both the state and local level, remains highly relevant today.

CONCLUSION

The Court of Appeals departed from this Court's precedent on an issue of constitutional and practical importance. Therefore, the Court should grant this petition for certiorari.

Respectfully submitted,

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279 F.3d 1204

United States Court of Appeals,
Tenth Circuit.

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association; Harry C. Talbott; Galen R. Wallace; Allen M. (Mac) Williams, Plaintiffs-Appellants,

v.

Monika TODD, in her official capacity as County Clerk of Mesa County, Colorado; Mesa County Board, Defendants-Appellees.

No. 00-1423.

Feb. 7, 2002.

Richard W. Daily, (Stephen K. ErkenBrack, with him on the briefs), Hale Hackstaff Tymkovich & ErkenBrack, L.L.P., Denver, CO, for Appellants.

Valerie J. Robison, Assistant Mesa County Attorney, (M. Lyle Dechant, Mesa County Attorney, with her on the brief), Mesa County Attorney's Office, Grand Junction, CO, for Appellees.

Before TACHA, Chief Judge, GARTH,* and BRISCOE, Circuit Judges.

TACHA, Chief Judge.

Appellants Save Palisade FruitLands and three of its members brought this suit under 42 U.S.C. § 1983, after the Mesa County Clerk, appellee Monika Todd, denied appellants' request to place a land-use proposal on the

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* The Honorable Leonard I. Garth, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

ballot as a county-wide initiative. Appellants argued that Colorado law, which grants the power to initiate legislation to the electors of home rule counties, but not to those of statutory counties, violates the Equal Protection Clause of the Federal Constitution. The United States District Court for the District of Colorado concluded that there was no denial of equal protection, and it therefore granted Todd's motion for summary judgment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and AFFIRM.

I. *Background*

A. *The Structure of the Colorado Initiative.*

In 1910, the people of Colorado adopted article V of the Colorado Constitution and reserved the powers of initiative and referendum. *Byrne v. Title Bd.*, 907 P.2d 570, 576 (Colo.1995) (en banc) (Mullarkey, J., dissenting). Article V, subsection 1(2) of the Colorado Constitution provides in part that "[t]he first power hereby reserved by the people is the initiative." Article V, subsection 1(9) further clarifies the scope of this reserved power: "The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities."

The Colorado Constitution does not explicitly reserve the right of initiative at the county level. In general, counties in Colorado are simply political subdivisions of the state government that possess only those functions that are granted to them by the constitution or by statute,

along with implied powers necessary to carry those functions out. *Pennobscot, Inc. v. Bd. of County Comm'rs*, 642 P.2d 915, 918 (Colo.1982) (en banc); *Dellinger v. Bd. of County Comm'rs*, 20 P.3d 1234, 1237 (Colo.Ct.App.2000). Colorado courts have rejected any argument that the general reservations of power in article V, subsections 1(1) and 1(2) might be construed to grant county governments the power to provide for initiatives. *Dellinger*, 20 P.3d at 1237-38 (considering, and then rejecting, various arguments that would authorize and require counties to provide for initiatives); *see also County Rd. Users Ass'n v. Bd. of County Comm'rs*, 987 P.2d 861, 863 (Colo.Ct.App. 1998) (noting in dicta that "the power of initiative and referendum is not generally reserved to the electors as to county governments"), *rev'd on other grounds*, 11 P.3d 432 (Colo.2000) (en banc).[1]

The constitutional scheme is complicated, however, by statutory grants of the initiative power to the electors of county governments in limited contexts. In some instances, this grant is given to the electors of all counties

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[1] When presented with a question of Colorado law that the Colorado Supreme Court has not resolved, our task is to predict how that court would rule on the issue. *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir.1984). In carrying out this task, "[w]e must also follow any intermediate state court decision unless other authority convinces us that the state supreme court would decide otherwise." *Id.; see also Comm'r v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). Appellants have provided us with no persuasive reason to conclude that the Colorado Supreme Court would reach a decision contrary to *Dellinger*, which we therefore follow as Colorado law.

with respect to specific types of legislation.[2] Colorado also distinguishes between statutory counties and home rule counties with respect to the power to initiate general legislation, and this distinction is the central focus of this litigation.

All counties in Colorado are initially created as "statutory" counties. These counties perform basic governmental functions such as managing the property of the county, maintaining streets and street lighting, creating mass transit, and making limited contracts for the fulfillment of these functions. Colo.Rev.Stat. § 30-11-101(1). A statutory county is governed by a board of county commissioners, who are constitutional officers elected in accordance with article 14, section 6 of the Colorado Constitution. The board has several specifically enumerated powers, such as levying taxes and providing for the maintenance of county buildings. Colo.Rev.Stat. § 30-11-107. It also has the power to control the zoning of land not incorporated into cities. Colo.Rev.Stat. § 30-28-102.

However, the Colorado Constitution provides a procedure for "statutory" counties to become "home rule" counties and thereby assume a greater degree of self-government. Colo. Const. art. XIV, § 16. To become a home rule county, a statutory county must adopt a home rule charter, which must be approved by a vote of the electors in the county. *Id.* While statutory counties have government structures that are specifically delineated in

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[2] For example, electors may initiate legislation regarding county sale and use taxes, and for the creation of public improvement districts. Colo.Rev.Stat. §§ 29-2-104, 30-20-505.

the state constitution, home rule counties are largely freed from these constitutional dictates. *Bd. of County Comm'rs v. Andrews*, 687 P.2d 457, 458 (Colo.Ct.App.1984) (noting that article XIV, section 16 frees home rule counties from the provisions of sections 6, 8, 9, 10, 12, and 15 of article XIV of the constitution, which set forth the type of officers who shall be elected in each county and how to choose and compensate them). While a home rule county still "must do the things that all counties must do and must provide the services all counties must provide," *id.*, there are numerous provisions in the Colorado statutes that either allow home rule counties to expand upon the powers already granted to statutory counties or grant home rule counties new powers altogether. For example, home rule counties have broader powers to incur indebtedness than statutory counties have. *Compare* Colo.Rev.Stat. § 30-35-201(6) (specifying procedures for home rule counties to incur general debt), *with* Colo.Rev.Stat. § 30-11-107(1)(dd) (allowing statutory counties to incur debt to finance energy-saving measures). Home rule counties have the power to provide for "public concerts and entertainments" and may advertise to attract tourists, *id.* § 30-35-201(3), (4), while statutory counties have no similar powers. These are but examples, and many other differences are apparent from even a cursory comparison of sections 30-35-201 and 30-11-107.

Among these many differences is the scope of the power of initiative. The electors of statutory counties in Colorado may only initiate legislation with respect to a very limited range of issues. *E.g.*, Colo.Rev.Stat. 29-2-104. Home rule counties, by contrast, are statutorily required

to provide for the initiative and referendum of all measures under the same strictures required for statewide ballot measures. Col.Rev.Stat. § 30-11-508. The difference in this grant of powers is what gives rise to this litigation.

B. *Save Palisade FruitLands*

Mesa County, Colorado is a statutory county situated on the border of Colorado and Utah. It contains several cities, including Palisade, Fruita, and the largest city in the county, Grand Junction. It is famous for its fruit production, especially in the eastern areas of the county. Land use in the county is governed by the Mesa County Planning Commission, which adopts land codes governing zoning and the divisibility of property.

Appellant Save Palisade FruitLands ("Save Palisade") is an unincorporated nonprofit association comprised of registered voters in Mesa County. Appellants Harry Talbott and Allen Williams are peach growers, and Galen Wallace is a viticulturist. All three are members of Save Palisade.[3] Throughout the 1990s, they and other farmers tried to halt the encroachment of residential subdivisions in Mesa County by attempting to place greater restrictions upon the ability of landowners to subdivide their property. After years of having their efforts rejected, and after several contentious public meetings debating the utility of such measures, Save Palisade and various farmers attempted to place a measure on the Mesa

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[3] For this reason, we will, for simplicity's sake, sometimes refer simply to Save Palisade as the appealing party.

County ballot that would restrict the ability of landowners to subdivide their land. On November 16, 1999, Monika Todd, the Mesa County Clerk, refused to place the proposed initiative on the ballot. Todd indicated that she could find no authorization for countywide initiatives in a statutory county such as Mesa County.

Save Palisade then brought suit against Todd and the Board of County Commissioners of Mesa County in the United States District Court for the District of Colorado. The court granted the defendant's motion for summary judgment shortly after the Colorado Court of Appeals issued its ruling in *Dellinger v. Board of County Commissioners*, 20 P.3d 1234, 1237-38 (Colo.Ct.App.2000), which held that the Colorado Constitution did not authorize the electors of statutory counties to initiate legislation. Save Palisade then sought to have the measure certified as a statewide ballot initiative. On December 6, 2000, the Ballot Title Setting Board determined that the measure was not a "statewide" measure, and it therefore refused to place the initiative on the ballot.

Appellants then brought this appeal, claiming that by granting the power of initiative to the electors of home rule counties but not to those of statutory counties, the Colorado courts denied the electors of statutory counties the equal protection of the laws.

II. *Discussion*

A. *Standard of Review*

We review the district court's grant of summary judgment de novo, applying the same legal standard used by

the district court. *Wark v. United States*, 269 F.3d 1185, 1187 (10th Cir.2001). Summary judgment is proper only if the evidence, reviewed in the light most favorable to the party opposing the motion, demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

B. *The Appropriate Level of Fourteenth Amendment Scrutiny*

Save Palisade argues that Colorado's decision to provide the initiative power to home rule counties but not statutory counties is subject to strict scrutiny under the Fourteenth Amendment's Equal Protection Clause. U.S. Const. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). If strict scrutiny applies, Colorado's statute must be narrowly tailored to further a compelling government interest. *Goetz v. Glickman*, 149 F.3d 1131, 1140 (10th Cir.1998). If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose. *Kinnell v. Graves*, 265 F.3d 1125, 1128 (10th Cir.2001). We subject governmental classifications to strict scrutiny under the Equal Protection Clause only if they target a suspect class or involve a fundamental right. *Goetz*, 149 F.3d at 1140.

1. *Suspect Class*

When legislation categorizes persons based on suspect classifications, such as race and national origin, we apply strict scrutiny. *Okla. Educ. Ass'n v. Alcoholic Beverage*

Laws Comm'n, 889 F.2d 929, 932 (10th Cir.1989). When legislation categorizes persons based on "quasi-suspect" classifications, such as gender and illegitimacy, we apply intermediate scrutiny. *Id.* Finally, when legislation categorizes persons on the basis of a non-suspect classification, we apply rational basis review. *Id.* In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is "based on characteristics beyond an individual's control," *id.*, and whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The classification here is statutory counties, in contrast to home rule counties, and citizens of the two types of counties *are* treated differently in Colorado. Status as a statutory county, however, has not been recognized as a suspect or quasi-suspect classification. Moreover, citizens of statutory counties lack the characteristics of a suspect class. *Id.* Being a statutory county is not a characteristic beyond Mesa County's control, as it can choose to become a home rule county. *Cf. Okla. Educ. Ass'n*, 889 F.2d at 932. Mesa County's citizens are free to work to effect this change. Neither the county nor its citizens claim to suffer disabilities, have a history of unequal treatment, or be politically powerless. *Cf. Rodriguez*, 411 U.S. at 28, 93 S.Ct. 1278. Thus, Save Palisade and its members are not entitled to heightened scrutiny on the basis of a suspect classification.

2. *Fundamental Rights*

Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution. *Okla. Educ. Ass'n*, 889 F.2d at 932. Save Palisade argues that its inability to bring an initiative in Mesa County burdens its members' fundamental constitutional rights to free speech and to vote. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (acknowledging that free speech is a fundamental right); *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (acknowledging that the right to vote is a fundamental right).

Here, there are two contexts within which the appellants' rights to free speech and to vote arguably could be implicated. First, it could be argued that the fundamental rights to speech and to vote are implicated within a broader right to bring an initiative, and that the power of initiative is therefore a fundamental right. However, nothing in the language of the Constitution commands direct democracy, and we are aware of no authority supporting this argument. In fact, every decision of which we are aware has held that initiatives are state-created rights and are therefore not guaranteed by the U.S. Constitution. *E.g., Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir.1993) (citing *Meyer v. Grant*, 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988)); *Kelly v. Macon-Bibb County Bd. of Elections*, 608 F.Supp. 1036, 1038 & n. 1 (M.D.Ga.1985). We agree with these courts' reasoning and reject this argument.

Second, it may be argued that regulations on the power of initiative violate the fundamental rights to free speech and to vote. It is true that the constitutionally guaranteed rights of free speech and voting may be implicated by attempts to regulate initiative schemes. *See, e.g., Meyer,* 486 U.S. at 424-25, 108 S.Ct. 1886. The mere fact that the state created a right to an initiative process in home rule counties, however, does not require that an initiative process be granted to all political subdivisions or with respect to all subjects. *Skrzypczak v. Kauger,* 92 F.3d 1050, 1053 (10th Cir.1996) ("[Plaintiff's] right to free speech in no way depends on the presence of [her initiative] on the ballot. Moreover, she cites no law, and we find none, establishing a right to have a particular proposition on the ballot."). In other words, the right to free speech and the right to vote are not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech associated with an initiative procedure, which is not the case here.[4] There is

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[4] Other courts have agreed with this analysis. In *Kelly,* for example, the plaintiffs brought an equal protection claim, alleging that their right to vote was burdened by procedural restrictions on their right to bring a referendum. 608 F.Supp. 1036. The court rejected this argument, holding that it was "*not* a 'right to vote' case" as plaintiffs asserted, but a referendum case, and that referenda "are not constitutionally compelled." *Id.* at 1038. The court further noted that the Constitution protects the right to vote in a general election, which is part of the right to representative democracy. *Id.* at 1038 n. 1. By contrast, the court stated, initiatives and referenda are expressions of direct democracy that are not guaranteed by the Constitution. *Id.* Thus, alleging a violation of free speech or voting rights does not transform what is essentially an initiative case into a voting rights case, and thereby trigger strict scrutiny.

no initiative scheme in place in statutory counties, so there cannot be an unlawful attempt to regulate that scheme.

The cases that Save Palisade cites in support of its argument are inapposite. First, none of these cases involves an equal protection claim. Second, and perhaps most important, all of these cases involve situations where a political subdivision had already been granted the power of initiative and the state attempted to regulate the speech associated with the initiative process. For example, in the primary First Amendment case cited by appellants, *Meyer v. Grant*, the Court struck down a law banning payments to petition circulators. Unlike the instant case, however, *Meyer* involved a situation where the state had already granted electors the power of initiative. 486 U.S. at 424, 108 S.Ct. 1886. Moreover, the *Meyer* Court struck down the law not because of anything unique to an initiative scheme, but rather because it limited the number of messengers available to spread core political speech. *Id.* at 422-23, 108 S.Ct. 1886.

The other free speech case cited by Save Palisade, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999), is likewise distinguishable. There, the Court held that a state's requirement that circulators of initiative petitions wear name badges infringed upon the circulators' rights to

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See also Stone v. City of Prescott, 173 F.3d 1172, 1175-76 (9th Cir.1999) (finding that the First Amendment is not implicated when the plaintiffs challenge the scope of the referendum right rather than challenging regulations on the exercise of that right).

anonymous free speech. *Id.* at 199-200, 119 S.Ct. 636. Like *Meyer, Buckley* involved an unconstitutional regulation of speech that happened to occur in the context of an existing initiative scheme.

Meyer and *Buckley* thus establish that, "where the people reserve the initiative or referendum power, the exercise of that power is protected by the First Amendment." *Stone,* 173 F.3d at 1175 (9th Cir.1999); *see also Austin,* 994 F.2d at 296-97 ("Unlike the challenged provisions in *Meyer,* Michigan's initiative system does not restrict the means that the plaintiffs can use to advocate their proposal."). They do *not* establish that when the power of initiative is created for one political subdivision, it must necessarily be created for all political subdivisions.[5] The Colorado Court of Appeals determined in *Dellinger* that the citizens of Colorado have not reserved the power of the initiative as to statutory counties, and that statutory counties therefore do not have the power of initiative. Because we are unpersuaded that the Colorado Supreme Court would disagree, we follow the *Dellinger* court's determination of state law. *Comm'r v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967); *Daitom, Inc. v. Pennwalt Corp.,* 741 F.2d 1569, 1574

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[5] It is worth noting the potentially broad remedy that petitioners seek. If we are required to apply strict scrutiny to Colorado's decision to grant the electors of statutory counties the power of initiative, then presumably we would be forced to apply the same level of scrutiny to school boards, fire districts, administrative agencies, and a host of other decision-making bodies whose decisions cannot, under the present scheme, be changed by direct democracy. We decline to make a ruling with such far-reaching implications.

(10th Cir.1984).[6] Because there is no petition process being regulated, and because there is no federal right to have such a process created, we find that the *Meyer* and *Buckley* analysis provides no basis for strict scrutiny.

Nor are the "right-to-vote" cases cited by petitioner any more persuasive. These cases establish conclusively that "the right to vote in an election is protected by the United States Constitution against dilution or debasement.' " *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir.1994) (quoting *Hadley v. Junior College Dist.*, 397 U.S. 50, 54, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970)). They do not establish that every political subdivision must decide questions in the exact same manner. *Reynolds v. Sims*, the first case cited by appellants, dealt with a situation where legislative districts were apportioned with grossly disproportionate numbers of voters in each district. 377 U.S. 533, 537-53, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). As a

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[6] Appellants repeatedly advance the proposition that Colorado's gradual delegation of legislative powers to counties represents an attempt to constrict the people's reserved powers in the constitution. In appellants' view, the increased role of county government effectively has resulted in the deprivation of citizens' right to initiate legislation on issues that previously would have been handled at the state level, and as such, would have been subject to the initiative.

The Colorado Court of Appeals addressed and rejected this precise argument in *Dellinger*, 20 P.3d 1234, 1237-38 (Colo.App.2000), and appellants' argument has not persuaded us that the Colorado Supreme Court would rule otherwise. Appellants do not explicitly argue that the scope of the initiative process may not be constricted once granted without violating the federal Constitution. As such, we leave the alleged constriction of the right to initiative to state courts.

result, individual voters in districts with small numbers of citizens effectively had disproportionate representation in the state House and Senate as compared to voters in districts with large numbers of voters. *See also Gray v. Sanders*, 372 U.S. 368, 379-80, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (invalidating Georgia primary scheme where candidates were selected under a "county unit" system that effectively weighted rural votes more heavily than urban votes). The other case cited by appellants, *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), involved a situation where ballots for a statewide post from different counties were recounted under disparate standards, raising the possibility that voters who cast identical ballots would have their votes treated differently when choosing electors for president. *Id.* at 106-09, 121 S.Ct. 525.

Both of the cases Save Palisade cites thus involve situations where two or more classes of voters cast votes on the same issue or for the same office, and one class's votes were effectively diluted. That is simply not the case here. While voters in home rule counties may have the ability to vote directly on county-wide measures affecting their own county – an ability not shared by their statutory county analogues – this in no way dilutes the votes of the electors of statutory counties. The reason is simple: Unlike the voters in *Bush* and in *Reynolds*, the voters in statutory and home rule counties never have their votes weighed differently on the same question. A statewide ballot is the only opportunity for true comparison. When that occurs, all voters, whether they reside in statutory or in home rule counties, are given an opportunity to vote.

We can find no burden on a fundamental right to vote under such a scheme.

Like the appellant in *Skrzypczak v. Kauger*, Save Palisade and its members are still free to express their view that Mesa County's land use process needs to be changed, and they have thus suffered no burden on their right to free speech. 92 F.3d 1050, 1053 (10th Cir.1996) ("[T]he Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue."). Nor have their rights to vote been diluted with respect to any other citizens of Colorado. Therefore, no fundamental right has been burdened.

C. *Rational Basis Review*

Having decided that the category created by Colorado infringes upon no *federal* fundamental right,[7] and having found no suspect classification, we evaluate Colorado's allocation of the power of initiative under minimal scrutiny. Under this standard, the classification need only bear a "rational relation to some legitimate end to satisfy

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[7] We would again reiterate that any potential right to an initiative is created at the state level only and does not involve a federal right. Colorado courts have clearly stated that this right does not exist at the statutory county level, *see supra*, and we accept that construction of the Colorado Constitution. Any complaint that a state right has somehow been diluted or that the Colorado Court of Appeals has "re-written the Colorado constitution" must be directed to the Colorado Supreme Court.

the Equal Protection Clause." *Kinnell v. Graves*, 265 F.3d 1125, 1128 (10th Cir.2001) (quoting *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)). We examine the statute to ensure that the state has sufficiently "treat[ed] like cases alike," and we will not act to keep a state from "treat[ing] unlike cases accordingly." *Crider v. Bd. of County Comm'rs*, 246 F.3d 1285, 1288 (2001) (quoting *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir.1998)).

Appellants ask us to compare apples and oranges when comparing home rule and statutory counties. As noted at the outset of this opinion, home rule counties have a broader range of powers than statutory counties. Moreover, home rule counties were created in order to give citizens of unincorporated areas a greater degree of autonomy in local affairs than they previously enjoyed. Both of these ends – facilitating a broader degree of powers and enhancing local autonomy – are legitimate government purposes. Granting the power of initiative to home rule counties and not statutory counties could advance both of these ends, and is therefore rationally related to either purpose.

It appears from a single mention in appellants' brief that the citizens of Logan County voted to place term limits on its Board of Commissioners. This does not change our analysis. One isolated, unchallenged incident in which the electors of one statutory county enacted legislation by an initiative does not give rise to an equal protection violation. We also cannot help but observe that the Logan County initiative was voted on in 1998, at least two years before the Colorado Court of Appeals' decision

in *Dellinger.* Thus, at the time of the Logan County initiative, there was no controlling legal authority that clearly forbade statutory counties from enacting legislation through an initiative process. Absent evidence that such initiatives are still occurring in some statutory counties in the face of what is now clear legal authority from the Colorado Court of Appeals, we refuse to find that Colorado is enforcing its laws in an arbitrary or irrational manner in violation of the Equal Protection Clause.

III. *Conclusion*

Appellants are still not without recourse. They can attempt to change the Colorado statute to grant the power of initiatives to statutory counties. They can attempt to have Mesa County adopt a home rule charter, thereby ensuring the right to initiate legislation. However, for the reasons stated above, the Equal Protection Clause of the Fourteenth Amendment does not command Colorado to grant the power of initiative to the electors of statutory counties simply because it has granted that power to the electors of home rule counties. The district court properly granted summary judgment to appellees, and its decision is therefore AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 99-Z-2248

SAVE PALISADE FRUITLANDS, a Colorado unincorporated nonprofit association, HARRY C. TALBOTT, GALEN R. WALLACE, and ALLEN M. (MAC) WILLIAMS,

Plaintiffs,

v.

MONIKA TODD, in her official capacity as County Clerk of Mesa, Colorado, and the MESA COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendants.

ORDER AND JUDGMENT

(Filed Sept. 29, 2000)

This matter was before the Court on September 28, 2000, for oral argument on Plaintiffs' Motion For Summary Judgment and Defendants' Motion For Summary Judgment. The Court heard the arguments and statements of counsel, and made oral conclusions of law which are incorporated herein by reference as if fully set forth. According, it is

ORDERED that Defendants' Motion For Summary Judgment filed July 27, 2000, is granted, it is

FURTHER ORDERED that Plaintiffs' Motion For Summary Judgment filed March 30, 2000, is denied. It is

FURTHER ORDERED that the Motion for Leave to Participate As Amicus Curiae filed September 26, 2000, is denied as moot. It is

FURTHER ORDERED that judgment is entered in favor of the defendants Monika Todd, in her official capacity as County Clerk of Mesa, Colorado, and the Mesa County Board of County Commissioners, and against plaintiffs Save Palisade Fruitlands, Harry C. Talbott, Galen R. Wallace, and Allen M. (Mac) Williams. It is

FURTHER ORDERED that the parties shall pay their own costs.

DATED at Denver, Colorado, this 29 day of September, 2000.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK,
Senior Judge United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-Z-2248

SAVE PALISADE FRUITLANDS, *et al.*,

Plaintiffs,

vs.

MONIKA TODD, *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 10:35 a.m., on the 28th day of September, 2000, in Courtroom C-400, United States Courthouse, Denver, Colorado.

APPEARANCES

RICHARD W. DAILY, Attorney at Law, 1675 Broadway, Suite 2000, Denver, Colorado, 80202, appearing for plaintiffs.

MAURICE LYLE DECHANT, Mesa County Attorney, and VALERIE J. ROBISON, Assistant Mesa County Attorney, 750 Main Street, P.O. Box 20000, Grand Junction, Colorado, 81502-5004, appearing for defendants.

Proceeding Recorded by Mechanical Stenography,
Transcription Produced via Computer by
Paul Zuckerman, 1929 Stout Street, P.O. Box 3563,
Denver, Colorado, 80294, (303) 629-9285

[2] **PROCEEDINGS**

(In open court at 10:35 a.m.)

THE COURTROOM DEPUTY: The matter now before the Court is Save Palisades Fruitlands, *et al.*, vs. Monika Todd *et al.*, Case No. 99-Z-2248.

THE COURT: Good morning. Let's first have appearances. Plaintiffs?

MR. DAILY: Good morning, your Honor. Richard Daily with Hale Hackstaff Tymkovich & ErkenBrack for the plaintiffs. With me at counsel table is one of the plaintiffs, Allen Mac Williams.

THE COURT: Okay. Thank you.

Representing defendants?

MS. ROBISON: Valerie Robison of the Mesa County Attorney's Office. With me at the table is Monika Todd, Clerk and Recorder of Mesa County, and Lyle Dechant, the Mesa County Attorney.

THE COURT: Before we start on any argument, I need to say to you folks that I have read the opinion by Judge Kapelke. It's a very competent panel: Judge Kapelke, Judge Rothenberg, Judge Casebolt. I think it is extremely well-reasoned. Their ruling, it appears to me, on what the Colorado Constitution and statute rule is right on and has to be followed by the Federal Court. I don't think there can be any argument.

They also considered the argument that was made to [3] them concerning the Federal Constitution; and they made a ruling on that, too. And quite frankly, even

though the Court may have some personal sympathies with plaintiff and a feeling that the law in Colorado should be different, I think that this opinion really resolves the case and tells this court that the decision should be made in favor of defendant, following the Colorado opinion, and that if there is going to be some change made, it should be made either by a change in the law, constitution, or statute, or by having plaintiffs attempt a statewide initiative.

So I think we should start with this. We have cross-motions for summary judgment. It really appears to me that the defendants' motion for summary judgment should be granted in view of this opinion, but I will perhaps start with plaintiff and let you take 10 minutes to tell me whether there is something I've overlooked or whether there is something else, Mr. Daily, that should be considered.

PLAINTIFFS' ARGUMENT

MR. DAILY: Your Honor, this is – thank you very much. This is like saying, "Mr. Daily, you lose; and now tell me why you don't."

THE COURT: Well, tell me what I'm missing.

MR. DAILY: Yes.

THE COURT: Because I think indeed you lose.

MR. DAILY: I will do that.

[4] *THE COURT:* And you lost when this decision was announced.

MR. DAILY: We think not. We think that decision actually forces the issue before this court. But before I get into that, there are a couple of other things which I need to bring to this court's attention.

First, the Honorable Kenneth Salazar has asked us or invited us to advise the Court that he agrees with the Colorado Court of Appeals. And that's a factor the Court needs to take into account today.

THE COURT: I'm not surprised.

MR. DAILY: Right. Well, there it is.

And second, the *Dellinger* plaintiffs have sought leave to file a *amicus* brief in support of our position. Has that made it to your Honor?

THE COURT: I think I've heard about that, but I haven't seen it.

MR. DAILY: If I may approach the bench, I have a courtesy copy for the Court.

THE COURT: I have a motion for leave to participate as *amicus curiae*; and I was frankly going to deny that, but go ahead.

MR. DAILY: I'll tell you why we think that you ought to grant that. If you have that before the Court – Does Counsel have –

[5] *THE COURT:* I have the motion right before me.

MS. ROBISON: No, I haven't seen the motion nor any brief.

THE COURT: The motion should have been sent to you folks.

MR. DAILY: This was filed on Tuesday, filed by the *Dellinger* plaintiffs.

THE COURT: It apparently was put in the mail to you yesterday. It's just a one-and-a-half page motion, so you can read it and – in a minute.

Do you have it there?

MS. ROBISON: Yes. He just handed it to me.

THE COURT: Okay.

MR. DAILY: And your Honor, here in a nutshell is what we have:

There are two plausible interpretations of the Colorado Constitution. And we're talking – we're focusing now on the same part of the Colorado Constitution that the court of appeals looked at. The first interpretation is an *expressio unius est exclusio alterius* kind of argument. We're going to run through the list of those parties which or levels of government at which this right will be recognized and inferentially exclude all others. That's one argument. And that's a plausible argument and has now been adopted by the Colorado Court of Appeals.

[6] The other argument is equally plausible, I submit, which is an *ejusdem generis* – E-J-U-S-D-E-M – argument, which is by listing the locations at which the right of initiative is recognized, you must also grant that right at other levels of like kind and nature.

That, I submit to the Court, is a plausible interpretation of the Colorado Constitution, one which the State of

Colorado, Mesa County, and the Attorney General have elected not to follow.

However, a Federal Court, when faced with two plausible interpretations of a state constitution, one of which denies a fundamental right to certain – to some but not all of its citizens and the other of which does not, then I think you have a pure equal protection challenge.

THE COURT: I think the problem with that argument is that we're not talking about all the women in counties being allowed to do an initiative but not the men; we're not talking about people under 35 being allowed and people over 35 not being allowed. You're talking about a state statute that says home rule counties are able to do something, whereas the other – the other counties do not have that initiative under either constitution or statute.

MR. DAILY: And that has to survive one of two tests, your Honor: either a strict scrutiny test, which we believe ought to apply, or a rational basis test.

[7] The strict scrutiny test would apply, we think, because the right to petition where the state has adopted the right of initiative – that right is a fundamental right under *Meyer vs. Grant* and *Buckley vs. American Constitutional Law Foundation.*

So we do trigger denial of a fundamental right based solely on where you live. Those who live outside – I mean take the Town of Palisade, Colorado, on the banks of the Colorado River, with a clearly defined municipal boundary. A resident who lives on one side of the street that's the boundary line has the right of – has the right to

circulate a petition, to require that a measure be placed on the ballot in the Town of Palisade as to, for example, a land use issue, which is within the legislative power of the town to enact. But across the street, a resident of a county who may be equally impacted by the land use legislation adopted by the relevant body does not have that right. That's a fundamental right that's being denied arbitrarily simply by virtue of where this person lives.

THE COURT: In his decision, Judge Kapelke indicates there is no federal constitutional right to the initiative process. And that is a correct statement.

MR. DAILY: There is no federal right to the initiative process; but once it has been granted, once that right has been allowed, you cannot deprive of a person of that [8] right or deny the person the equal opportunity to enjoy that right.

Now, here's why –

THE COURT: And this due process and this equal protection argument was indeed, I believe, made to the court in the *Dellinger* case.

MR. DAILY: In fact, it was not in the terms I'm presenting it to this court. They – there was a federal due process right but not the federal equal protection right that we're arguing today, and that's clarified by the briefs which are now on file before this court, so the Court can see exactly what it is that's being argued or that was argued to the court of appeals in the *Dellinger* case.

So we have what we believe is a fundamental right being advanced and allowed to certain citizens by virtue of living – living within the boundary of a municipality

but denied to others. So we think it fails under strict scrutiny.

We also think it fails under a rational basis. The only purpose that we can see that that's served by the adoption of this particular interpretation of the Colorado Constitution is to entrench the power, the monopoly over legislative powers enjoyed by the county commissioners.

We submit under the *Nordlinger* case that it's inappropriate for a state – it's not a rational basis because it's not a permissible basis to create – to interpret a [9] measure that would deny people the fundamental – excuse me – that would deny people the right to participate in the political process.

What's left at the county level is only the right of recall. If the political aspirations of the citizens as to issues are frustrated, the only tool they have available to them is the right of recall, whereas in cities, towns, indeed school boards, you have an intermediate tool, which is the tool of initiative. You don't have to use the nuclear weapon to rid the county of the power structure. You can use the right of petition as to particular issues that are susceptible to petition.

We think, as I said, in furthering the entrenched power of the existing power structure is not a rational or reasonable basis upon which the Court can find or can justify the denial of equal protection here.

That's why we think the court of appeals decision lays bare a serious federal constitutional problem with the interpretation adopted by the court of appeals and that advanced by the county here.

THE COURT: Thank you. Let me hear what defendant wishes to respond.

DEFENDANTS' ARGUMENT

MS. ROBISON: Thank you, your Honor.

First of all, I really want to stress that despite the [10] plaintiffs' claims that this is a fundamental right case, it simply is not. As stated in the *Dellinger* case, the power of initiative and referendum is not a fundamental right guaranteed under the United States Constitution. And it has not been granted nor reserved to the citizens of counties.

That's No. 1. So we don't have a fundamental right at issue, because the Dellinger case, the law, the constitutional provision under Article V do not provide for that fundamental right. It has not been granted nor reserved to the citizens of counties in a non home rule setting. That's No. 1.

No. 2 is that the plaintiff has attempted to separate the entities in this case as the towns, municipalities, home rule –

THE COURT: On one side of the street and the county on the other.

MS. ROBISON: – and counties on the other. But in reality, one of the things that the plaintiffs clarified in their reply to our motion for summary judgment is that in actuality what we're looking at are political subdivisions of the state, and the county is a political subdivision of the state. And as a political subdivision of the state, they have certain responsibilities. And the county is not – and

has been stated in case law that it is not an inherent sovereign authority. And that's what cities are, home rule counties are: They have some sovereign authority because they have charters.

[11] Home rule – excuse me – counties do not. We are merely arms and agents of the state. We exist for the convenient administration of the state.

And if you look at it from a political subdivision standpoint, there are a bunch of political subdivisions in the State of Colorado and within that system. There are again counties, cities, cities and counties, towns, school districts, special districts, local improvement districts, service districts. There are a ton of political subdivisions, and most of them do not have the power of referendum and initiative. And many of those political subdivisions have some legislative capability, and that's one of the distinctions that the plaintiffs tried to make: that if you have legislative ability, then you ought to have the power of initiative and referendum.

But one of the largest political subdivisions that is not a traditional one that we look to has legislative capabilities, and that's a school district. A school district legislates. They create budgets, they create taxes, they do various legislative functions; and when you look at it with the overall umbrella of political subdivisions, the delineation that has been made under our constitution and under *Dellinger* is very clear. We have some with sovereign authority and some without, and those without do not have the power of referendum and initiative. Counties are one of those. And until that changes it's not a right. It's not a fundamental right.

[12] And therefore, if there is any basis that this case needs to be looked at under, it would be a rational basis, a rational analysis.

And under the equal protection clause of the United States, we look at it in a rational basis and we determine that if there is a state rationale that supports any distinction, if there is any, then it's upheld. And in this case, there is. There is a rational basis for counties being different from cities.

The counties have all of their powers derived from the state. We don't have any inherent sovereignty.

The *Cleburne* case which was cited by the plaintiff – and I believe may be cited by the defendants as well – talks about that all persons similarly situated should be treated alike. Counties simply are not similarly situated as cities. We're just not.

THE COURT: Not similarly situated to home rule counties?

MS. ROBISON: That's correct. We don't have charters. We don't have anything that allows us to have any powers other than what is granted by the state.

And based on that, the equal protection challenge ought to fail.

THE COURT: Thank you.

I'm going to give you a chance to respond. And let me [13] just direct your response to a question. There is no question that in *Meyer vs. Grant,* it says that once the

right has been granted, then it must be done in a constitutional way. But the right of initiative has never been granted to non home rule counties.

PLAINTIFFS' REBUTTAL ARGUMENT

MR. DAILY: But it has been reserved to all citizens by the citizens of the state to all citizens of the state. And here's why – here's why the county is wrong, Judge:

First, she says the County doesn't exercise sovereignty. That's just plain not true. The – Look at Exhibit 7, if you will, to our motion for summary judgment. Exhibit 7 is extracts from the Mesa County Land Development Code. This is what the plaintiffs in this action are seeking to amend. This document is itself the exercise of sovereign powers. Look at page 1 following the cover page. "Authority: This land development code is adopted pursuant to the powers and authority conferred by the laws of the State of Colorado including, but not limited to," and so forth.

The county exercises sovereign power over land use. That is – I mean if the county did not, its land development code would be a legal nullity. This land development code governs all land use in the County of Mesa. It is not a legal nullity. This very document is legislation and is the embodiment of legislative power, sovereign power.

[14] That's what we're talking about. We're talking about political power, the power to enact legislation.

Now, in 1910 – We're approaching the 90th anniversary of the adoption of the right of initiative by the

people of Colorado. In 1910, counties did not have that sovereign power. They had no sovereign power. They had the power merely to implement what the General Assembly dictated.

The General Assembly has delegated some of its sovereign powers to the counties, specifically including the power to enact things like the Mesa County Land Development Code.

How can it be that the right of initiative as a check against the power of legislation adopted at the – excuse me – initiative and referendum as a check against legislative power adopted by the General Assembly applies there but not as to legislative powers delegated by the General Assembly? My goodness. If it's a reservation of power as to the acts of the General Assembly, why isn't a reservation of power as to those actions taken by its delegates, the counties? How can the – how can the State of Colorado sanction a regime where the delegated powers are somehow slid out of the umbrella of the safeguard, the protection of the right of initiative?

I don't think that makes any legal sense whatsoever. And I think that's one of the fatal flaws underlying Judge Kapelke's reasoning.

[15] I like Judge Kapelke. I think he's a very honorable guy. I agree with you the panel is superb, but I think they're wrong. And the *Dellinger* plaintiffs are of course taking them up, and we intend to support them with an *amicus* brief to the best of our ability.

But that's why they're wrong. I mean, they failed to recognize that the counties are exercising these delegated

powers, and the counties in fact are exercising, contrary to what the County says here, those sovereign powers.

THE COURT: Thank you.

Just one moment, please.

Well, this argument – is there something further you need to say?

MS. ROBISON: Just very briefly, your Honor.

THE COURT: Extremely briefly.

DEFENDANTS' SURREBUTTAL ARGUMENT

MS. ROBISON: Yes. First of all, the adoption of a land development code is something that's provided for in the statutes that requires counties to do certain functions. One of them is to do a land development code. And so it is not a sovereign authority that that code is adopted. It is something that is delegated by the state. It is again that function of the state.

Second of all, there are early cases, earlier than 1910, that distinguished between municipalities and counties. [16] One of them is *Colburn vs. Board of County Commissioners* at 61 Pacific 214. And it's a 1900 case. And in there, they distinguish between counties and municipalities. And so whether or not the – excuse me – the initiative that was adopted in 1910, there was prior notice to everybody that counties were different. So the omission of counties has to be something that was at least thought of.

THE COURT: Thank you.

MS. ROBISON: Okay.

RULING

THE COURT: I really don't have much question here. This same argument was made indeed to the Colorado Court of Appeals and to the author of that opinion, Judge Kapelke. He says in his decision that he sympathized with plaintiffs' position; he was not, however, going to rewrite the Colorado Constitution.

This court sympathizes with the plaintiff's position, but neither am I going to rewrite the Colorado Constitution. That Colorado Constitution has been interpreted by the appellate court, an excellent panel of the Colorado Court of Appeals; and I think their decision is correct and that this court should follow it and indeed is bound to follow it, since the Colorado courts are the first interpreters of the Colorado Constitution, not the federal courts.

As to the federal issue, if, indeed, there had been an [17] initiative right reserved to counties and if indeed it was being interpreted or applied in an unconstitutional manner, then this court would indeed be involved. If we had a situation, as I indicated before, where men were not permitted the initiative, women were, or whether it was done by age or by race or in some other unconstitutional manner, there is no problem. But I frankly don't see that we have an unconstitutional application where under the Federal Constitution – where the right was simply not

conferred on counties. At least the non home rule counties.

So basically, I think it's without much question in my mind that the court of appeals decision is correct; that it should be followed. Judge Kapelke said that the court of appeals agrees with the trial court's conclusion that there is no constitutional right of initiative for electors at the county level. This court agrees with that, also.

And I also agree that there is no federal constitutional equal protection reason to change this Colorado constitutional makeup or scheme.

Accordingly, this court will indeed grant the motion for summary judgment of the defendant, deny the motion for summary judgment of the plaintiff, deny the motion for leave to participate or deny as moot the motion for leave to participate as *amicus*, and I'm going to leave it up to plaintiffs to argue this to a higher court, if that's what you wish to do.

[18] I'm sure this can be raised not only this year but next year if you can get some change in the law or if you can bring the initiative as a state measure or if your efforts can turn what is now a county into a home rule county. There is other alternatives open. But the law is correctly stated in the *Dellinger* opinion, and this court is not going to change that.

For the reasons stated on the record here and for the reasons set forth by the court of appeals in the *Dellinger* opinion, the defendants' motion for summary judgment is granted, plaintiffs' is denied. And as I indicated, the

motion for leave to participate as *amicus* is denied as moot.

I appreciate the argument. It has been extremely interesting. And as I say, I hope there can be some other way for plaintiff in a constitutional way to achieve their objective, but not this lawsuit.

Anything further from either side?

MR. DAILY: Yes, your Honor. Thank you very much for your prompt ruling. Will this be the entirety of the Court's ruling so that if we obtained a transcript, the judgment enters today?

THE COURT: This is the judgment. It will be incorporated by reference. If you want to get –

MR. DAILY: We will.

THE COURT: – a transcript from Paul, you're [19] certainly welcome to do that. We'll try to get this out – This afternoon is extremely busy, but we'll try to get it out sometime tomorrow morning.

MR. DAILY: I just need to know when my clock starts ticking.

THE COURT: It will start clicking probably tomorrow morning, when I get the final judgment signed.

MR. DAILY: Thank you very much. We don't believe we have a state right of initiative as to a local issue like this. We think that's precluded by 1 sub 9, so we will take this up to the circuit court.

THE COURT: I will follow it with some interest.

MR. DAILY: We sure appreciate your attention to this matter, your Honor.

THE COURT: And I hope that – Unless the parties can work out some other agreements, but I don't think you're really going to be able to.

MR. DAILEY: Under the Court's ruling, they couldn't do it if they wanted to.

THE COURT: Thank you.

MR. DAILY: Thank you, your Honor.

MR. DECHANT: Thank you, your Honor.

THE COURT: We will be in recess.

(Recess at 11:05 a.m.)

* * *

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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 29th day of September, 2000.

/s/ Paul A Zuckerman
Paul A. Zuckerman

CO CONST Art. V, § 1

§ 1. General assembly – initiative and referendum

(1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.

(2) The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

(3) The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions, against any act or item, section, or part of any act of

the general assembly, either by a petition signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election or by the general assembly. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative.

(4) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon, and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(5) The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment. No later than two weeks after submission of the original

draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public, which shall be held only after full and timely notice to the public. Such meeting shall be held prior to the fixing of a ballot title. Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed measure or to establish deadlines for the submission of the original draft of the text of any proposed measure.

(5.5) No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5)

shall not operate to alter or extend any filing deadline applicable to the measure.

(6) The petition shall consist of sheets having such general form printed or written at the top thereof as shall be designated or prescribed by the secretary of state; such petition shall be signed by registered electors in their own proper persons only, to which shall be attached the residence address of such person and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing said petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

(7) The secretary of state shall submit all measures initiated by or referred to the people for adoption or rejection at the polls, in compliance with this section. In submitting the same and in all matters pertaining to the form of all petitions, the secretary of state and all other officers shall be guided by the general laws.

(7.3) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly shall cause to be published the text and title of every such measure. Such publication shall be made at least one time in at least one legal publication of general circulation in each county of the

state and shall be made at least fifteen days prior to the final date of voter registration for the election. The form and manner of publication shall be as prescribed by law and shall ensure a reasonable opportunity for the voters statewide to become informed about the text and title of each measure.

(7.5)(a) Before any election at which the voters of the entire state will vote on any initiated or referred constitutional amendment or legislation, the nonpartisan research staff of the general assembly shall prepare and make available to the public the following information in the form of a ballot information booklet:

(I) The text and title of each measure to be voted on;

(II) A fair and impartial analysis of each measure, which shall include a summary and the major arguments both for and against the measure, and which may include any other information that would assist understanding the purpose and effect of the measure. Any person may file written comments for consideration by the research staff during the preparation of such analysis.

(b) At least thirty days before the election, the research staff shall cause the ballot information booklet to be distributed to active registered voters statewide.

(c) If any measure to be voted on by the voters of the entire state includes matters arising under section 20 of article X of this constitution, the ballot information booklet shall include the information and the titled notice required by section 20(3)(b) of article X, and the mailing of such information pursuant to section 20(3)(b) of article X is not required.

(d) The general assembly shall provide sufficient appropriations for the preparation and distribution of the ballot information booklet pursuant to this subsection (7.5) at no charge to recipients.

(8) The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado".

(9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen per cent to propose any measure by the initiative in any city, town, or municipality.

(10) This section of the constitution shall be in all respects self- executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law.

20 P.3d 1234

Colorado Court of Appeals, Div. V.

Daniel G. DELLINGER and Committee for Growth Limits, an unincorporated association, Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS FOR the COUNTY OF TELLER and Connie Joiner as Clerk and Recorder for Teller County, Defendants-Appellees.

No. 99CA0403.

Sept. 14, 2000.
Certiorari Denied April 9, 2001.

Isaacson, Rosenbaum, Woods & Levy, P.C., *Edward T. Ramey*, Denver, Colorado; J. Gregory Walta, P.C., *J. Gregory Walta*, Colorado Springs, Colorado; American Civil Liberties Union Foundation of Colorado, *Mark Silverstein*, Denver, Colorado, for Plaintiffs-Appellants.

Sparks Willson Borges Brandt & Johnson, P.C., *Christopher M. Brandt, Stephen A. Hess*, Colorado Springs, Colorado, for Defendants-Appellees.

Opinion by Judge *KAPELKE*.

In this action for declaratory and injunctive relief, plaintiffs, Daniel G. Dellinger and Committee for Growth Limits, appeal from the summary judgment entered in favor of defendants, Board of County Commissioners for the County of Teller (Board) and Connie Joiner, Clerk and Recorder for Teller County (Clerk and Recorder). The primary issue on appeal is whether the right of initiative set forth in Colo. Const. art. V, § 1, is applicable to, and exercisable by, the electors of unincorporated, non-home-

rule counties in Colorado. We agree with the trial court that it is not and, therefore, affirm.

The facts are essentially undisputed. Plaintiffs, purporting to act pursuant to § 30-11-103.5, C.R.S.2000, sought to place, by petition of the electors of Teller County (the County), a citizen initiative on the ballot in the County for the November 1998 general election. The proposed initiative would require the County to "place a one percent limit on the annual increase in new residential dwelling units in unincorporated associations."

Plaintiffs' petition did not contain the number of signatures required by Colo. Const. art. V, § 2 for a statewide initiative.

Although the Clerk and Recorder deemed the initiative sufficient for purposes of § 30-11-103.5, she nevertheless referred the matter to the Board. Reasoning that the constitutional right of initiative did not extend to non-home-rule counties except in certain statutorily defined contexts, the Board refused to allow the initiative to appear on the ballot and directed the Clerk and Recorder to withhold it from the ballot.

Plaintiffs then filed this action, seeking entry of a temporary restraining order and a preliminary injunction to compel the Board to place the initiative on the ballot. In their motion, plaintiffs argued, as pertinent here, that the Board's refusal to place the initiative on the ballot violated the right of initiative reserved exclusively to the People by Colo. Const. art. V, § 1. The court denied the motion.

Plaintiffs filed an appeal in this court and an emergency motion for mandatory injunction, which was denied. Thereafter, they filed in the supreme court an emergency petition for writ in the nature of mandamus and injunction pursuant to C.A.R. 21. The supreme court denied the petition. The appeal in this court was dismissed upon plaintiffs' motion.

Later, the parties filed cross-motions for summary judgment in the trial court. In defendants' motion, they argued that the right to initiative under Colo. Const. art. V, § 1, was reserved "at the statewide, and also at the city, municipal or town level, but *not* at the county level." Plaintiffs in their motion asserted that the defendants' actions had been in derogation of plaintiffs' constitutionally reserved right of initiative under Colo. Const. art. V, § 1, and thus violated their constitutional rights of free expression, due process, and equal protection under the United States and Colorado Constitutions.

The court entered summary judgment in favor of defendants, finding that there was no federal constitutional right of initiative at the state or local level, that the Colorado Constitution did not confer a right of initiative at the county level, and that plaintiffs' constitutional rights had thus not been violated. This appeal followed.

I.

Plaintiffs contend that the right and power of initiative as reserved to the People pursuant to Colo. Const. art. V, § 1, are applicable to and exercisable by the electors of unincorporated, non-home-rule counties in Colorado. We disagree.

Colo. Const. art. V, § 1 provides, in pertinent part:

> (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.
>
> (2) *The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition,* and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.
>
> . . . .
>
> (9) The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every *city, town, and municipality* as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities,

> towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. (emphasis added)

In *County Road Users Ass'n v. Board of County Commissioners*, 987 P.2d 861, 863 (Colo.App.1998), a division of this court stated that "the powers of initiative and referendum are not generally reserved to the electors as to county governments." While we agree with plaintiffs that the division's comment in that case was dictum, we nevertheless find it to be an accurate statement of the law.

In construing the Constitution, we must give terms their ordinary and popular meaning. *Bolt v. Arapahoe County School District No. Six*, 898 P.2d 525 (Colo.1995). Further, where the language of the Constitution is plain and its meaning clear, the language must be enforced as written. *Colorado Ass'n of Public Employees v. Lamm*, 677 P.2d 1350 (Colo.1984).

Here, there is no reference to counties in Colo. Const. art. V, § 1(1) & (2). Further, as plaintiffs acknowledge: "Nowhere – and particularly nowhere in the 'further' reservation of the initiative power from local governments in Article V, section 1(9) – is there a specific reference to counties." Plaintiffs also recognize that: "Section 1(9) should *not* be read to include counties, as such a reading would violate both the plain language and historical realities that existed at the time Section 1(9) was adopted."

Each of these sections was adopted in 1910, at a time when, as plaintiffs point out, county governments did not exercise legislative functions to any significant extent, if

at all. Thus, plaintiffs do not argue that the drafters or those who adopted these constitutional provisions actually contemplated that the initiative and referendum processes would extend to legislative issues at the county level, as such.

Nevertheless, plaintiffs argue that, in light of "the historical evolution of the role and function of county governments in Colorado since 1910," we should interpret Colo. Const. art. V, § 1, as including a right on the part of electors to initiatives on a county-wide basis. We are not persuaded.

A county is a political subdivision of the state, not an independent governmental entity existing by reason of any inherent sovereign authority of its residents. Accordingly, a county possesses only such powers as are expressly conferred by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such powers. *Board of County Commissioners v. Love*, 172 Colo. 121, 470 P.2d 861 (1970); *see also Pennobscot, Inc. v. Board of County Commissioners*, 642 P.2d 915 (Colo.1982).

As noted, the rights of initiative and referendum are not generally reserved to the electors as to county governments. Colo. Const. art. V, § 1(1), (2), and (3) grant legislative power to the General Assembly with a reservation to the People of the powers of initiative and referendum. These reserved powers are further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation. Colo. Const. art. V, § 1(9). They are not, however, expressly reserved to the electors of counties, as such.

By statute, though, electors of counties have been granted rights of initiative on a county-wide basis in certain limited contexts. Section 29- 2-104, C.R.S.2000, for example, provides for the proposal by initiative of county-wide sales tax ordinances. Also, § 30-11-508, C.R.S.2000, requires that the charters of home-rule counties contain procedures for the "initiative and referendum of measures." No statutory authorization exists, however, as to county-wide initiatives for electors in non-home-rule counties. Nor is there any statute specifically authorizing initiatives at the county level such as that proposed here concerning housing growth limits.

Thus, plaintiffs' contention is not supported by the constitutional provisions, by their underlying historical intent, or by any statutory authority.

Essentially, plaintiffs are arguing that we should interpret Colo. Const. art. V, § 1, to authorize initiatives at the county level because the adopters of the initiative provisions would have intended to do so had they known or envisioned that county governments would later exercise significant legislative authority and functions.

We recognize that the power of initiative "is a fundamental right at the very core of our republican form of government." *McKee v. City of Louisville*, 200 Colo. 525, 616 P.2d 969 (1980). As the trial court found here, however, each Colorado elector does in fact possess that right, albeit at the state level, pursuant to Colo. Const. art. V, § 1(1) and (2).

Plaintiffs urge that, because county governments today are exercising a legislative function, as subordinate agencies of the state they could only have acquired that

power by devolution from the General Assembly. That devolution or delegation could not, they assert, be free of the right of initiative reserved to the People under Colo. Const. art. V, § 1.

The argument has a certain ring of logic. Nevertheless, given the absence of support in the language or historical intent of this constitutional provision, we must reject plaintiffs' contention.

We cannot ignore the fact that the provisions of Colo. Const. V, § 1(1), (2), and (9) expressly authorize initiatives at the state and municipal level, but do not do so at the county level. Nor can we ignore the fact that the General Assembly has seen fit to provide for county-wide initiatives only with respect to home-rule counties or as to specific, defined subjects such as the adoption of sales tax ordinances. In our view, to interpret Colo. Const. art. V., § 1 as conferring a general right of initiative at the county level would require a rewriting of that provision. This, of course, we are not free to do. *Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (1997).

We therefore agree with the trial court's conclusion that there is no constitutional right of initiative for electors at the county level.

In light of our disposition of this issue, we need not address plaintiffs' contention that the procedures in § 30-11-103.5 would govern their proposed initiative.

II.

Plaintiffs also contend that the right of initiative as created and defined by the Colorado Constitution implicates liberty interests that are entitled to the procedural guarantees of the Due Process Clause of the Fourteenth Amendment. We disagree.

Plaintiffs rely on *Montero v. Meyer,* 13 F.3d 1444 (10th Cir.1994) as supporting their contention. *Montero,* however, is inapposite. That action arose from an initiated amendment to the Colorado Constitution designating English as Colorado's official language. The amendment had been initiated pursuant to Colo. Const. art. V, § 1(1) & (2), which reserves to the People the power to propose and enact amendments to the constitution.

Here, as concluded above, there is no constitutional provision extending the power of initiative to the electors on a county-wide basis. Further, we note that the court in *Montero* rejected the argument that the Colorado Constitution and Colorado statutes governing the ballot initiative created in the plaintiffs there a liberty interest within the meaning of the Fourteenth Amendment. *See also Committee for Better Health Care v. Meyer,* 830 P.2d 884 (fn. 7) (Colo.1992) ("[T]here is no federal constitutional right to the initiative process").

Accordingly, we perceive no error.

The judgment is affirmed.

Judge *ROTHENBERG* and Judge *CASEBOLT* concur.